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In Equity, No. 666.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS,

v.

AMERICAN RAILWAY EXPRESS COMPANY, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

FEBRUARY, 1924.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

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BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a decree of the District Court of the United States for the Northern District of Georgia, enjoining temporarily enforcement of an order of the Interstate Commerce Commission, dated July 9, 1923, the body of which reads:

> These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, under date of March 12, 1923, having made a report (78 I. C. C., 126), and on the date hereof, having made and filed a supplemental report, said reports containing its findings of

fact and conclusion thereon, which said reports are hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co., from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Co. and the Southeastern Express Co. at Washington, D. C.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish, on or before October 20, 1923, upon like notice to this Commission and to the general public, and thereafter to maintain and apply to the transportation of shipments of express, rates between the points designated in the preceding paragraph which shall not exceed the rates contemporaneously in effect between said points over the routes now used, and that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed.

And it is further ordered, That this order shall continue in force until the further order of the Commission. (Rec. 43–44, No. 667.)

The order was made and entered by the Commission in proceedings pending before it on said July 9, numbered respectively 12784 and 12786. In describing the parties to the proceedings and the matters complained of therein, in its report of March 12, above mentioned, the Commission said:

> The Southeastern Express Co., hereinafter called the Southeastern, alleges that the failure of the American Railway Express Co., hereinafter called the American, to establish through routes and joint rates and charges on interstate express traffic, to observe the designation of routing by the shipper, and to establish just, reasonable, and equitable divisions of joint rates, is unduly preferential of the American's routes, unduly and unlawfully discriminatory against and prejudicial to the Southeastern's routes and to shippers desiring to use them, and results in lower rates to and from more distant exclusive points than those applicable to and from intermediate common points, in violation of sections 1, 2, 3, 4, 6, and 15 of the interstate commerce act. We are asked to prescribe joint through express routes and joint rates, charges, rules, and regulations for the operation of such joint through routes; to require that all available routes be kept open and that the same rate be made applicable between any two points regardless of the route of movement; and to

require the American to observe shippers' routing instructions, and permit the use of through express cars over joint routes whenever business makes it necessary. We are also asked to determine and fix just, reasonable, and equitable divisions of the joint rates and charges and order an adjustment to be made in accordance therewith on all shipments which moved under joint rates subsequent to May 23, 1921, the date the complaint was filed. At the hearing it was agreed that the entire question of divisions be reserved for future consideration.

Both express companies are defendants in the complaint of the Southern Fisheries Association. This complaint asks that the express companies be required to establish universal joint through routes, rates, classifications, rules, and regulations. The issues are identical with those presented in the Southeastern case. The complaints were consolidated at the hearing and this complainant was there treated as an intervener in No. 12784.

About 15,000 tons of fish are taken each year from the waters in and adjacent to Southeastern territory. The members of the Southern Fisheries Association distribute these fish to various markets throughout the South, East, and West. From 60 to 70 per cent move by express. The Southeastern reduced its local rates on fresh fish and sea foods 10 per cent, and the members of the Southern Fisheries Association, whenever possible, use its services. Expedition is of great importance, and this complainant desires that all

routes be open and that the shipper have the right to route.

The Atlanta Freight Bureau; Southern Traffic League; Merchants Association of Concord, N. C.; Asheville, N. C., Chamber of Commerce; Western North Carolina Chamber of Commerce; Mobile Chamber of Commerce; and United States Fisheries Association intervened and introduced evidence. The Macon, Ga., Chamber of Commerce; New Orleans Joint Traffic Bureau; Savannah Traffic Bureau; Jacksonville Chamber of Commerce; Jacksonville Traffic Bureau; and James E. Grady & Co. intervened but presented no evidence.

All the interveners are of the opinion that it will be in the public interest that all direct routes be made available, that the shipper should have the right to route, and that through competition the public will obtain better express service.

In June, 1918, as a war measure, the existing express companies were consolidated and the American, the defendant herein, was formed. We approved the continuation of this consolidation in *Consolidation of Express Cos.*, 59 I. C. C. 459, decided December 7, 1920. The American was the only express company in operation from July 1, 1918, to May 1, 1921.

The Southeastern was incorporated under the laws of Alabama in October, 1920, and opened its offices for business on May 1, 1921. It was formed principally by men who were either connected with or interested in the

contentions, the Commission reported findings and conclusions as follows:

> We are of the opinion and find that it is necessary and desirable in the public interest that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Co. and points on the lines of the Southeastern Express Co., regardless of the fact that one company may have a reasonable direct single-line route, or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Co. and the other via the transfer point selected by the American Railway Express Co.; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings.
>
> The American should cancel its restrictive schedules and the express companies should recognize as "established routes" the reasonable direct routes which they shall establish in accordance with our findings. Each express

> company, when traffic received by it is unrouted, should have the right to use the reasonable route which will give it the longest haul, but if the express is routed via "established routes" the routing instructions should be obeyed. The best way to provide for the establishment of routes may be for each company to have individual routing guides showing its selected routes. The shipper should then be allowed to route over any route contained in either guide. (Rec. 32–33, No. 667.)

At the time the Commission made its report of March 12, however, it refrained from making a formal order and left the express companies free to agree upon the establishment of through routes. In this connection the Commission said:

> It should not be difficult for the express companies to decide between themselves as to what routes are or are not reasonable. They could be aided by an arbitration committee with duties similar to those of the former direct-routing committee. We can not pass upon the reasonableness of all routes at this time. Express schedules are constantly changing. The express companies will be given an opportunity to comply with our findings herein. If it later becomes necessary we will pass upon those specific routes upon which the express companies fail to reach a satisfactory agreement. (Rec. 33, No. 667.)

Subsequent to said March 12, in a report submitted by them which is Exhibit 2 to the bill of complaint,

representatives of the express companies advised the Commission that they had been unable to reach an agreement in the premises, whereupon, after denying a petition for reargument and for modification of the report of March 12, and after suspending the operation of a tariff which was to become effective on July 14, 1923, filed by American Railway Express Company, appellee herein, the Commission made and entered the supplemental report and order of July 9, 1923. In said supplemental report the Commission made additional statements and reaffirmed the findings and conclusions contained in the report of March 12, as follows:

> We can require a carrier to perform only a reasonable act. The question of divisions over joint routes still remains for determination. The reasons set forth in the original report, including testimony of record that at competitive points the express service has improved because of competition, demonstrates that the additional joint routes from American exclusive points to common points are reasonable and in the public interest.
>
> It was our expectation that the principles laid down by us in our report would be complied with without the necessity of entering an order. It is now apparent that an order is necessary.
>
> We shall at this time by order prescribe certain through routes and joint rates with respect to which the record warrants the finding that they are reasonable and will require their establishment, reserving for further

consideration either upon the present record or upon further hearing the establishment of additional routes.

We are of the opinion and find that it is necessary and desirable in the public interest that through routes and joint rates applicable thereto be established between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, and New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Co. from Washington to and including Birmingham, Ala., on the other, with transfer between the American Railway Express Co. and the Southeastern Express Co. at Washington, D. C.

We further find that the rates contemporaneously applicable between the above-named points over routes now used are and for the future will be just and reasonable rates for application over the routes herein prescribed.

We further find that the tariffs should provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed.

All findings herein are without prejudice to issues presented in Docket No. 13930, *Express Rates*, 1922, now pending before us. (Rec. 42, No. 667.)

Reasons advanced by appellees in support of their contention that the order of July 9 is invalid are

contained in paragraph 22 of the bill of complaint, and may be summarized as follows:

> 1. The order deprives appellee, American Railway Express Company, of its liberty and property without due process of law.
>
> 2. The order compels said appellee to short-haul itself, if required by shippers to do so.
>
> 3. The order is in conflict with paragraph (4) of section 15 of the interstate commerce act, which prohibits such short-hauling.
>
> 4. The order requires the establishment of through routes without providing for the divisions of joint rates applicable to such routes.

In its answer, the Commission denies that the order deprives appellee, American Railway Express Company, of its liberty or property without due process of law; denies that said appellee is a carrier by railroad, within the meaning of paragraph (4) of section 15 of the act, and denies the alleged effect of other matters advanced by said appellee in its bill of complaint, in support of its contentions that the order is invalid.

In a majority opinion, Circuit Judge Bryan dissenting, the lower court sustained said contentions only to the extent of holding that express companies are "carriers by railroad" within the meaning of paragraph (4) of section 15 of the interstate commerce act and that the order of the Commission involved herein is in conflict with the prohibition against short-hauling of carriers by requiring the establishment of through routes, contained in said paragraph.

Assignments of error filed on behalf of the United States and the Commission are six in number and are to the effect that the aforesaid holdings are erroneous.

Pertinent language contained in the majority opinion of the lower court is as follows:

> By paragraph 3 of section 15 of the amended interstate commerce act power is clearly given the Commission, either on complaint or on its own initiative, to establish through routes when deemed necessary or desirable in the public interest. When one sufficient through route already exists there can be no necessity for another in the strictest sense, but certainly another may be desirable in the public interest. The competition between the carriers interested in the routes is generally considered to be itself in the public interest, because better service is likely to ensue. The repeal by the act of June 18th, 1910, of the proviso which formerly prevented the enforced duplication of routes shows the Congressional intent that it should be allowed. We are not prepared to say the order is arbitrary or unreasonable because made avowedly to foster competition.
>
> Nor do we think the order infringes the constitutional guarantees to liberty and property in giving the shipper an election which may deprive the American Railway Express Company of its long haul. If otherwise valid, it is only a part of the system of regulation and of rate making to which public service companies consent or at least subject

themselves when they enter the business. Such regulation when done in the public interest and not arbitrarily is not unconstitutional. Besides it must be assumed that full justice will be done when the rate comes to be divided. (Rec. 123, No. 667.)

The objection to the order that it puts a route into operation without having first fixed the division of the rate is unsustainable. The record shows a waiver of the matter. Furthermore, the prefixation is not required by the interstate commerce act; *Railway Co.* v. *United States*, — U. S. —, decided February 19, 1923. And lastly the division can often be more justly made after some trial of the new route. (Rec. 127, No. 667.)

Whether the shipper's choice of routes when established follows as a necessary consequence of the establishment of them, or whether the Commission has power, under paragraph 3 of section 15, to provide for it as one of the "terms and conditions" on which the route is to be used, or whether the power is to be considered as given by an application to express companies of paragraph 8 of section 15, we do not find it necessary to decide. * * *. (Rec. 127, No. 667.)

We think the order transgresses the prohibition of par. 4 of section 15 of the interstate commerce act; * * *. (Rec. 123, No. 667.)

* * * We feel constrained to hold that "carrier by railroad" by the dictionary of the act means here just what it did when first used by the act of 1906, to-wit, "common carrier, including express and sleeping-car

company, which carries by railroad." (Rec. 126, No. 667.)

* * * Since "carrier" wherever used in the act means "common carrier" and since "common carrier as used in this act shall include express and sleeping-car company," "carrier by railroad" in paragraph 4 section 15 must be read "common carrier, including express and sleeping-car company, by railroad." And so read the provision can reasonably be applied to an express company, and its transportation arrangements with and over railroads, referred to as "lines" in the end of the paragraph under discussion. (Rec. 126, No. 667.)

* * * An interlocutory injunction will be granted, but without prejudice to the right of the Commission to enquire whether, because the existing routes are unreasonably long or for other cause particularly appearing, any of the proposed new routes can be established consistently with paragraph 4 of section 15 of the interstate commerce act, and if so to order their establishment. (Rec. 127–128, No. 667.)

ARGUMENT.

I.

THE LOWER COURT ERRED IN HOLDING THAT EXPRESS COMPANIES ARE COMMON CARRIERS BY RAILROAD WITHIN THE MEANING OF PARAGRAPH (4) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

The contentions of appellees in connection with the subject matters covered by the above heading were answered by the Commission in its report of March 12, as follows:

> The American contends that if the route used by it is a reasonable one and gives the

same service in point of time as the joint route sought by the Southeastern we have no power to require the establishment of such joint route and require the American to short-haul itself, even if the joint route with the Southeastern be also reasonable.

Paragraphs (3) and (4) of section 15 of the interstate commerce act provide:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated * * *.

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini

of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established." * * *

The phrase in paragraph (3) "applicable to the transportation of passengers and property" includes express traffic. The limitation in paragraph (4) with respect to our power to establish through routes applies to "any carrier by railroad" only. The Southeastern claims that this phrase does not include express companies, and the American contends that it does.

In *Wells Fargo & Company* v. *Taylor*, 254 U. S. 175, the United States Supreme Court held that the term "common carrier by railroad" as used in the employer's liability act of April 22, 1908, does not include express companies. The court said:

"In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad, * * * and by the fact that similar words in the original interstate commerce act had been construed as including carriers operating railroads but not express companies doing business as here shown."

In discussing this case, the American urges that the question there considered was the application of the Federal employer's liability Act, which regulated the liability of railroads for personal injuries; that the present case deals with the express business which is a part of the franchise obligation of a railroad, and an act of Congress conferring administrative powers over express companies or carriers by railroad which has a broader and more general purpose; and that the part of the act under consideration has a purpose broad enough to include property carried by express.

The express company does not own or operate lines of railroad. In its business the separate lines of each railroad are not observed, but by contract the express company operates as a unit over the lines of the various companies. Section 15 (4) by its terms refers to "carriers by railroad," and does not include express companies. Nor can it be said that the principle there announced should be applied to express companies.

It is our conclusion that the provisions of paragraph (4) of section 15 do not apply to express companies, and it is unnecessary to discuss cases cited in which the courts and this Commission have applied the law in dealing with routes established and connections required to be made between "carriers by railroad."

Aside from the construction placed upon paragraph (4) of section 15, the American claims that under paragraph (4) of section 1, if it provides through routes and reasonable

> facilities for their operation, it has fulfilled its common-carrier duty to the public, and that we can not require it to establish additional joint through routes which would short-haul it.
>
> Prior to 1910 our authority to establish through routes was limited by the following language:
>
> "Provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."
>
> This limitation has now been removed, and we are required to establish through routes whenever deemed by us necessary or desirable in the public interest, and it is for us to determine on the basis of a proper record what express routes are reasonable and in the public interest. (Rec. 20–21, No. 667.)

The limitation upon its authority to establish through routes, which the Commission referred to as having been eliminated by the Mann-Elkins Act of June 18, 1910 (36 Stat. L. 539), was included in the Hepburn Act of June 29, 1906 (34 Stat. L. 584, 590).

This change in the authority over through routes conferred upon the Commission was made immediately after this court had applied the limitation mentioned, by its decision in *Interstate Commerce Commission* v. *Northern Pacific Railway Company*, 216 U. S. 538, and by making the change Congress manifested clearly an intention to clothe the Commission with authority to determine the number of through routes which should be established in a given case. Also, such intention is further evidenced by an amendment

to the interstate commerce act contained in the transportation act of February 28, 1920.

The fourth paragraph of section 15 of the interstate commerce act, as amended by section 12 of the Mann–Elkins Act, read as follows:

> And in establishing such through route, the Commission shall not require any *company*, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established. [Italics ours.]

Pertinent language of paragraph (4) of section 15 of the interstate commerce act, as amended by the transportation act, is:

> In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any *carrier by railroad*, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established. * * * [Italics ours.]

It will be observed that the word "company" contained in the Mann-Elkins Act, was changed by the transportation act to read "carrier by railroad."

Prior to the passage of the transportation act the authority of the Commission to require the establishment of through routes depended, among other things, upon whether the carriers had refused or neglected to establish voluntarily such routes, and by comparing the second paragraph of section 15 of the interstate commerce act, as amended by the Hepburn Act, with the third paragraph of said section, as amended by the Mann-Elkins Act, it will be seen that other limitations upon the authority of the Commission in connection with the establishment of through routes, which were included in the Hepburn Act, were eliminated by the passage of the Mann-Elkins Act. Formerly the authority of the Commission to require the establishment of through routes was limited by the words "when that may be necessary to give effect to any provision of this act," while, as above shown, the present authority of the Commission to require the establishment of through routes depends upon whether, in the opinion of the Commission, the establishment of such routes is "necessary or desirable in the public interest."

In its report of March 12 the Commission quoted at length from its reports in *Express Rates, Practices, Accounts, and Revenues*, 24 I. C. C., 380, and 28 I. C. C., 131, and called attention to the fact that action taken by it in those two cases was designed

to, and did, remedy the evils which had been brought about by an attempt on the part of each of the eleven express companies then in existence to secure to itself the longest possible haul of any express traffic delivered to it for transportation. The Commission stated that such efforts on the part of the express companies had resulted in great damage to the public interests, but that after the rulings made by the Commission in consequence of the circumstances and conditions developed by its investigations in those cases had been put in force the evils and detriment referred to disappeared.

The rules prescribed by the Commission required the express companies to join in the establishment and publication of through routes and joint rates and provide for a free interchange of express traffic at junction points.

The Commission further stated that after the consolidation of the express companies into the American Railway Express Co., appellee herein, the latter discontinued through routes which had formerly been used in connection with the transportation of express traffic and established other through routes, for the purpose of obtaining for itself the longest possible haul, and that this action on the part of said appellee brought into existence again the detriment to the public interests which the action taken by the Commission in the express cases mentioned was designed to and did remove and prevent.

In expressing its opinion that the public interests require that there shall be more than one through

route between important points of origin and destination, the Commission said:

> The testimony shows that the express service at common points has improved since the formation of the Southeastern. This improvement is probably due to competition. There is no competition as to rates because all rates are the same under the block system. The only exception to this is the Southeastern's rates on fish, referred to above, but they are applicable only to Southeastern local points. When fish originate at or are destined to American points the American rates apply. In considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices, rules, and regulations in regard to its methods of doing business. Taking all of these things into consideration and the fundamental principles laid down in our two decisions in the Express case, we find as a fact that it is in the interest of the public to order established reasonably direct joint express routes. (Rec. 29–30, No. 667.)

As further tending to show that the ruling of this court in *Wells-Fargo & Company* v. *Taylor*, *supra*, has an important bearing upon the matter under consideration here, we call attention to the analogy as to jurisdiction which exists between the interstate commerce act and the Federal employers' liability act. Pertinent words contained in the former are:

"That the provisions of this Act shall apply to common carriers engaged in * * * The transportation of passengers or property wholly by railroad, * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia," etc., while in the latter it is provided, "That every common carrier by railroad while engaging in commerce between any of the several States or territories," etc.

It will also be observed that reasons set forth by this court, as hereinbefore shown, in its decision in the *Taylor case*, in support of its holding that an express company is not a carrier by railroad within the meaning of the Federal employers' liability act, namely, that, "This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad," harmonize with the definition of railroad contained in paragraph (3) of section 1 of the interstate commerce act, which is as follows:

> * * * The term "railroad" as used in this act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary

> in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

In considering paragraph (4) of section 15 of the interstate commerce act, it seems to us that the words "its railroad" are significant and indicate what is meant by "carrier by railroad." If an express company is a "carrier by railroad" what is "its railroad," and what is an "intermediate railroad operated in conjunction and under a common management or control therewith"? The language contained in said paragraph (4) appears to us to make plain the intent that a carrier by railroad shall be one which has a railroad. An express company merely uses or employs a carrier by railroad to transport express matter for it, not from origin to destination but from one railroad station to another, and does not "manage" or "control" or "operate" the railroad or any intermediate railroad. It also uses or employs carriers by water or by stage or motor to transport express matter for it, and before many years will doubtless use or employ carriers by air to transport a large part of the express matter. But it is not and will not be a carrier by railroad or by water or by stage or motors or by aircraft, and will still be subject to the interstate commerce act under section 1 of that act.

II.

IN REQUIRING THE EXPRESS COMPANIES NAMED IN THE ORDER OF JULY 9 TO FILE TARIFFS PROVIDING FOR THE RIGHT OF SHIPPERS TO DESIGNATE THE ROUTING OF SHIPMENTS BY EXPRESS OVER ESTABLISHED THROUGH ROUTES, THE COMMISSION ACTED IN ACCORDANCE WITH AUTHORITY CONFERRED UPON IT BY PARAGRAPH (3) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

As hereinbefore shown, the lower court did not find it necessary to determine whether the Commission is authorized by paragraph (3) of section 15 of the interstate commerce act to require express companies to provide in their tariffs that shippers shall have the right to designate the routing of their shipments over established routes. In this connection, however, the lower court, among other things, said:

> Nor do we think the order infringes the constitutional guarantees to liberty and property in giving the shippers an election which may deprive the American Railway Express Company of its long haul. If otherwise valid, it is only a part of the system of regulation and of rate making to which public service companies consent or at least subject themselves when they enter the business. Such regulation when done in the public interest and not arbitrarily is not unconstitutional. Besides it must be assumed that full justice will be done when the rate comes to be divided. (Rec. 123, No. 667.)
>
> * * * Having concluded that the order before us is violative of paragraph 4 of section

> 15, it must be enjoined irrespective of whether the new routes, if established, would open an insistence of their use to the shipper or to the Southeastern Express Company. That one or the other or both should have the right to use them must be true or else the opening of them over the objection of the American Railway Express Company would be a quite idle performance. * * *. (Rec. 127, No. 667.)

The Commission stated that the right of the shipper to designate routing was a part of the system of express rates and practices prescribed by it in the express cases above mentioned; that by disregarding this right appellee, American Railway Express Company, is violating its own express classification, and that the Commission has power to require express companies to accord such right to shippers. The language of the Commission in this connection is:

> * * * The right of the shipper to designate routing was a part of the system of express rates and practices prescribed by us (e) in the cases herein referred to. The express companies themselves provide in their express classification that the shipper has a right to route. Under section 15 (3) we have not only the power to require through routes and joint rates, but also to prescribe the "terms and conditions under which such through routes shall be operated"; and under this power we may provide for the right of the shipper to route. Certainly the establishment of alternative through routes would be of no advantage

if the shipper has no right to direct that traffic shall move over such routes. (Rec. 31, No. 667.)

* * * The fundamental principles laid down in the *Express cases* were prescribed at a time when there were 11 express companies. They should be followed now. The fact that we expected express companies to establish the most direct routes regardless of their long haul, is shown by the following quotation taken from the first opinion, supra, page 411:

"We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own line, and that division shall be agreed upon which shall compensate the originating carrier for its sacrifice." (Rec. 29, No. 667.)

CONCLUSIONS.

We think the matters hereinbefore set forth show clearly that, in conferring upon the Commission authority to require the establishment by carriers of through routes, the Congress intended to, and did, make a distinction between railroad companies who operate railroads and express companies who do not, and also make manifest that, because of the differences in circumstances and conditions pointed out by the Commission, as aforesaid, between services performed by express companies on the one hand

and those performed by railroad companies who operate railroads on the other, such a distinction is proper and should be made. We are also of opinion that nothing contained in the record in this case indicates that in making the order of July 9 the Commission either acted in excess of the authority which had been conferred upon it by the Congress or in conflict with any provision of the Constitution of the United States.

We therefore insist that the decree of the lower court should be reversed and that this case should be remanded to that court with instructions to dismiss the bill of complaint.

Respectfully submitted.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

FEBRUARY, 1924.